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Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000505-MR

THE HUNTINGTON NATIONAL BANK
AND HUNTINGTON ACCEPTANCE COMPANY
(COLLECTIVELY, THE HUNTINGTON) APPELLANTS

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 94-CI-005804

HENRY H. PORTER; BURTON J. SMITH;
JOHN A BRENZEL; AND DDR RENTAL
AND LEASING, INC., D/B/A DOLLAR
RENT-A-CAR OF KENTUCKY APPELLEES

AND: NO. 2001-CA-000509-MR

DDR RENTAL LEASING, INC.; HENRY H. PORTER;
AND B.J. SMITH CROSS-APPELLANTS

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 94-CI-005804

THE HUNTINGTON NATIONAL BANK;
THE HUNTINGTON ACCEPTANCE COMPANY;
AND THE ESTATE OF ROBERT E. CLINE CROSS-APPELLEES

AND: NO. 2003-CA-001022-MR

DDR RENTAL LEASING, INC. APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE THOMAS J. KNOPF, JUDGE
ACTION NO. 94-CI-005804

THE HUNTINGTON NATIONAL BANK;
THE HUNTINGTON ACCEPTANCE COMPANY;
AND THE ESTATE OF ROBERT E. CLINE APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: BARBER, GUIDUGLI, AND VANMETER, JUDGES.

BARBER, JUDGE: These consolidated appeals arise out of various orders of the Jefferson Circuit Court that adjudged DDR Rental and Leasing, Inc., d/b/a Dollar Rent-A-Car of Kentucky (DDR) liable to Huntington National Bank and Huntington Acceptance Company (collectively Huntington) for a debt owing by DDR under a loan agreement referred to as “floorplan” financing by the parties. The circuit court also determined that certain claims were subject to a directed verdict and that Huntington was entitled to attorney fees. We affirm in part, reverse in part, and remand for further proceedings.

DDR was in the rental car business in Louisville, Kentucky. The stockholders of DDR were Henry H. Porter, Burton J. Smith, and John A. Brenzel (the stockholders). DDR originally obtained its financing from First National Bank in Louisville. However, the loan officer at that bank, Robert E. Cline, took employment with Huntington and DDR switched its affiliation to that entity.

It is undisputed that DDR received floorplan financing from Huntington for $8.6 million. The parties are in disagreement about whether Huntington was also obligated to extend another $5 million in "overline" financing to DDR. DDR's rental car business operated on the premise that the floorplan financing was used to pay for all aspects of the enterprise including its fleet of rental cars. Under the accepted business practice DDR would purchase cars from local dealers that were then subject to a repurchase agreement with those dealers. That is, after a certain time DDR would resell the cars to the dealers for an agreed upon amount of money and purchase new cars for its fleet. In this way DDR kept its inventory fresh.

Huntington had a security interest in the cars purchased from the dealers, and when DDR received monies from resale to the dealers, it was designated to be paid to Huntington toward DDR's outstanding debt on the floorplan. Before the dealer would repurchase the cars it required

Huntington to release its lien on them. Since the monies from the repurchase of cars were paid directly to DDR, Huntington was left unsecured as to the vehicles turned in, and determined that it wished to have further security for its extension of credit. Thus, Huntington asked the stockholders of DDR to sign an agreement whereby they promised to reimburse Huntington for any losses Huntington might suffer from DDR's failure to abide by its repurchase agreements with the dealers.

DDR, Henry H. Porter, and Burton J. Smith claim that Huntington, through its representative, Robert E. Cline (Cline), promised to extend overline financing of $5 million to DDR in order for DDR to purchase new cars before receiving payment for the cars turned in under the repurchase agreements. They claim that DDR received this financing at its former banking institution and Cline promised this financing in order to induce DDR to switch its banking to Huntington. Huntington denies that it ever promised such financing to DDR or the stockholders.

Prior to the trial in this case the circuit court decided various motions. As to these appeals, the court determined that the agreement between the stockholders of DDR and Huntington that purported to indemnify Huntington for its losses was actually a guaranty agreement. As such, the circuit court decided that KRS 371.065 barred its enforcement for failure to comply with the terms of the statute.

The remaining claims in the case were tried before a jury from October 10, through November 17, 2000. The jury determined that DDR was liable to Huntington under the floorplan note in the amount of $3,804,480.00, but did not award DDR and the stockholders anything on counterclaims not relevant here. The circuit court also ruled that Henry H. Porter's claims against Huntington for fraud should not be submitted to the jury and directed a verdict in Huntington's favor.

In appeal No. 2001-CA-000505-MR, Huntington appeals from the circuit court's ruling finding the agreement executed between the stockholders of DDR and Huntington was a guaranty agreement, and as such, subject to KRS 371.065. It also brings a protective appeal contending that it was entitled to summary judgment on one of DDR's counterclaims.

In appeal No. 2001-CA-000509-MR, DDR, Henry H. Porter, and Burton J. Smith cross-appeal claiming that the circuit court erred in its jury instructions; by denying the company the right to open and close the proof on its claims; by admitting certain hearsay testimony; and by dismissing Henry H. Porter's fraud claim against Huntington.

Subsequent to the trial, the circuit court found that Huntington and the Estate of Robert E. Cline were entitled to attorney fees and costs, and awarded them $745,454.68 and

$29,120.93, respectively. DDR appeals the award of attorney fees in appeal No. 2003-CA-001022-MR.

All three cases have been consolidated for our review. Any further factual circumstances necessary to a decision of the various appeals will be considered along with the parties' arguments below.

Huntington's first argument in its direct appeal, (Appeal No. 2001-CA-000505-MR) is that the trial court erred when it determined that the instrument signed by the stockholders of DDR and styled "Indemnity Agreement" was actually a guaranty agreement that did not comply with KRS 371.065, and, therefore, was unenforceable.

The interpretation and construction of contracts is a matter of law for the court to decide and our review of the circuit court's findings is undertaken *de novo*. Frear v. P.T.A. Industries, Inc., Ky., 103 S.W.3d 99, 105 (2003); First Commonwealth Bank of Prestonsburg v. West, Ky. App., 55 S.W.3d 829, 835 (2000); Fay E. Sams Money Purchase Pension Plan v. Jansen, Ky. App., 3 S.W.3d 753, 757 (1999); Cinelli v. Ward, Ky. App., 997 S.W.2d 474, 476 (1999).

It is true that a court cannot create ambiguity in a contract where none exists, First Commonwealth Bank of Prestonsburg v. West, 55 S.W.3d 829, 836 (2000); and that a contract must be interpreted in accordance with the parties'

intent gathered from the instrument itself if possible. Monroe's Adm'r v. Federal Union Life Ins. Co., 251 Ky. 570, 65 S.W.2d 680, 681 (1933). However, simply concluding that the contract at issue is an indemnity contract because it is labeled as such and because of the wording used in the body of the contract is incorrect. It is the effect of an instrument that determines its character, not the style afforded it by the parties. Terrill v. Kentucky Block Cannel Coal Co., 290 Ky. 35, 160 S.W.2d 326, 328 (1942); Duncan v. Mason, 239 Ky. 570, 39 S.W.2d 1006, 1008 (1931); Kentucky Rock Asphalt Co. v. Milliner, 234 Ky. 217, 27 S.W.2d 937, 939 (1930).

Huntington complains that the circuit court impermissibly considered a prior draft agreement that was not signed by the parties in interpreting the contract at issue here. We have determined that this is irrelevant since it is not necessary to consider the prior unexecuted contract in order to determine the nature of the one that was executed.

The contract at issue here is an agreement for the stockholders to "unconditionally agree to indemnify The Huntington Acceptance Company" until it receives "payment in full of all liabilities owing by Borrower [DDR] to Huntington." The liabilities were conditioned on the performance of DDR pursuant to the various repurchase agreements that it had with dealers.

An indemnity contract is defined as one in which the obligation requires the promisor (the stockholders) "to make good any loss or damage which another [(Huntington)] has incurred while acting at the request or for the benefit of the promisor [(the stockholders)]." Intercargo Ins. Co. v. B.W. Farrell, Inc., Ky. App., 89 S.W.3d 422, 426 (2002). In the indemnity contract, the promisor (the stockholders) promised to protect Huntington from loss or damage as a result of DDR's liability to Huntington.

A guaranty, on the other hand, is an agreement where the promisor (the stockholder) promises to protect Huntington "from liability for a debt resulting from the failure of a third party [DDR] to honor an obligation to that promisee [Huntington]." Id. A guaranty contract is characterized by the promise to protect the promisee (Huntington) against loss or damage through the failure of DDR to fulfill its obligations to Huntington. Id. See also, Thomasson v. Pineco, Inc., 173 Ga. App., 794, 794-795, 328 S.E.2d 410, 411-412 (Ga. App., 1985) for a clear discussion of the differences between indemnity and guaranty contracts.

Clearly the contract in this case seeks to hold the stockholders liable for a debt owed by DDR to Huntington. This is a straightforward guaranty contract regardless of the label and wording used.

Since we have determined that the trial court was correct in finding that the contract was one of guaranty rather than indemnity, then KRS 371.065 applies. Under the plain meaning of KRS 371.065, guaranty contracts must state "the amount of the maximum aggregate liability of the guarantor thereunder, and the date on which the guaranty terminates," unless the guaranty is contained within the instrument being guaranteed, or expressly refers to the instrument being guaranteed. KRS 371.065(1); Wheeler & Clevenger Oil Co., Inc. v. Washburn, Ky., 127 S.W.3d 609, 614-615 (2004). KRS 371.065 applies to all guaranty contracts. APL, Inc. v. Ohio Valley Aluminum, Inc., Ky. App., 839 S.W.2d 571, 575 (1992).

In this case the guaranty contract between the stockholders and Huntington is not contained within an instrument being guaranteed, nor does it expressly refer to an instrument being guaranteed. Thus, its failure to comply with the other requirements of KRS 371.065 is fatal to its enforcement.

Huntington's second argument on appeal is that the circuit court should have granted it summary judgment with respect to claims by DDR regarding the $5 million overline credit extension. Since the jury did not award DDR any damages for this claim, the appeal by Huntington is a protective appeal

and given that we are affirming the trial court's judgment as to Huntington and DDR, there is no need to decide this issue.

On cross-appeal, DDR, Porter, and Smith have alleged various grounds for reversal of the jury's verdict. Their first argument is that the trial court incorrectly instructed the jury on DDR's breach of contract claim against Huntington concerning the $5 million overline financing. The jury was instructed with respect to this claim as follows:

> You will find for DDR if you are satisfied from the evidence:
>
> a) that DDR and HAC understood and orally agreed to a temporary $5,000,000.00 overline financing;
> b) that HAC failed to comply with the material terms of the agreement;
> c) that DDR was damaged as a result of HAC's failure;
> d) that DDR complied with all material terms of the agreement.
>
> Otherwise you will find for HAC and HNB [Huntington].

DDR complains that the circuit court erred by including subpart (d) in the instructions to the jury. We disagree.

The contract claim that DDR made against Huntington alleged that Huntington failed to provide $5 million in overline financing, and this resulted in the failure of the business. To find for DDR on this claim, the jury was required to find that a contract existed; the terms of that contract obligated Huntington to extend up to $5 million in financing to DDR; that Huntington failed to do so; and that the breach of the contract

caused harm to DDR. It further had to find that DDR complied with all *material* terms of the contract.

It is unknown whether the jury believed that none of the elements were satisfied or just the fourth element requiring it to find that DDR complied with all material terms of the contract. DDR only complains as to the fourth element, but this is a defense to the enforcement of a contract and was clearly an issue tried before the jury. Thus, whether or not contained in the parties' pleadings, if it is tried to the jury, then the court is authorized to instruct the jury according to those issues actually tried. Shanklin v. Townsend, 467 S.W.2d 779, 781 (1971).

DDR's contention that Huntington's failure to perform excuses its failure to comply with material terms of the contract is unpersuasive. This contention is a question of fact that was apparently never presented to the jury, DDR never requested an instruction on this issue nor raised an objection as to the court's failure to submit such an instruction.

DDR, Henry H. Porter, and Burton J. Smith's second argument is that the circuit court erred by refusing to realign the parties so that they would have opened and closed the proof and also made closing arguments to the jury last.

CR 43.01(2) allocates the burden of proof to "the party who would be defeated if no evidence were given on either

side." CR 43.02(c) requires that party to produce its evidence first.

Clearly Huntington would be defeated on its claim against DDR and the stockholders if it presented no proof. It is also clear that DDR and the stockholders would be defeated on their various counterclaims if no proof were presented. The trial court has broad discretion in determining the course and proceeding of trial, including the allocation of the burden of proof. Where, as here, there are multiple parties and multiple issues to be decided, the circuit court's ruling will not be disturbed absent a showing that it abused its discretion. Dayoc v. Johnson, Ky., 427 S.W.2d 569, 571 (1968); Connecticut Indemnity Co. v. A.K. Kelley, Ky., 301 S.W.2d 584, 586 (1957); Blackburn v. Beverly, 272 Ky. 346, 114 S.W.2d 98, 102 (1938). DDR has failed to show that the trial court abused its discretion by denying its motions to realign the parties.

DDR, Henry H. Porter, and Burton J. Smith also contend that the court allowed prejudicial hearsay testimony from John Cline's widow to be admitted, and that this constituted reversible error, or that their motion for a mistrial should have been granted.

John Cline's widow was allowed to testify in rebuttal to testimony from the general manager of DDR that he had met John Cline at Churchill Downs in 1991, and had a discussion

regarding the financing of DDR in which calculations were made on a tablecloth. The widow was allowed to testify that there were no tablecloths in use in this particular room of Churchill Downs. She was also permitted to testify regarding John Cline's character.

DDR, Henry H. Porter, and Burton J. Smith contend that this testimony was hearsay, irrelevant, and prejudicial. Even if this contention were true, the nature of the testimony and its overall importance in a six-week trial is so slight that it did not affect the substantial rights of the parties. CR 61.01. Further, granting a motion for mistrial should only be done when it appears to be a manifest necessity. Gould v. Charlton Co., Inc., Ky., 929 S.W.2d 734, 738 (1996). The error, if any, in admitting the testimony and refusing to grant a mistrial is not reversible.

Henry H. Porter has appealed the trial court's directed verdict in favor of Huntington on his claim of fraud.

When granting a directed verdict the trial court is required to draw all inferences in favor of the nonmoving party. On appellate review the evidence must be considered in the same light. Baylis v. Lourdes Hosp., Inc., Ky., 805 S.W.2d 122, 125 (1991); Lambert v. Franklin Real Estate Co., Ky. App., 37 S.W.3d 770, 775 (2000).

To sustain a claim of fraud, Henry H. Porter was required to show, by clear and convincing evidence, that Huntington made a material misrepresentation; that it was false; that it was known to be false or made with reckless regard for whether or not it was false; that Huntington made the material misrepresentation with an inducement that it be acted upon; that Henry H. Porter acted in reliance on the material misrepresentation; and that Henry H. Porter suffered injury as a result. United Parcel Serv. Co. v. Rickert, Ky., 996 S.W.2d 464, 468 (1999).

The evidence, taken in the light most favorable to Henry H. Porter, is that Huntington, through its representative, John Cline, made representations that he had more authority at Huntington than at his previous employment, and that he represented to DDR that Huntington would provide the floorplan financing and the overline financing. These representations were made in order to induce DDR to move its banking to Huntington, and that was done. Henry H. Porter, in reliance on these promises, executed notes on behalf of DDR on which he eventually had to personally pay $173,749.28 to Huntington.

The circuit court directed a verdict on this claim because it did not believe that Henry H. Porter had introduced any evidence that material misrepresentations were directed at him rather than DDR. However, the law is clear that indirect

influence may be a basis for liability if the one making those misrepresentations should reasonably anticipate the reliance of the third party. Here it seems reasonable that Henry H. Porter would rely on representations made by Huntington and that his reliance should be anticipated. Taking the evidence in the light most favorable to Henry H. Porter, we believe that the circuit court should not have directed a verdict on this issue.

The final appeal is by DDR alone and is from the trial court's order awarding attorney fees to Huntington. The award of attorney fees is within the discretion of the trial court. King v. Grecco, Ky. App., 111 S.W.3d 877, 883 (2002). DDR has not argued that the court abused its discretion. Therefore, the award of fees is affirmed.

The judgment of the Jefferson Circuit Court is affirmed in part, and reversed as to the directed verdict entered in favor of Huntington against the fraud claim of Henry H. Porter. The case is remanded for proceedings consistent with this opinion.

VANMETER, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT.

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